APPENDIX A

District Court of the United States

Northern District of Illinois

Eastern Division

ROSEMARY C. MOGGE and OFFICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 28, AFL-CIO,

Plaintiffs,

v.

DISTRICT NO. 8, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Defendant.

No. 65 C 1716

Memorandum and Order

The complaint in this matter charges a wrongful discharge of an employee in violation of a collective bargaining agreement. It is somewhat unusual in that the employer charged with the violation is itself a labor union. The complaint charges that the defendant employer (hereinafter referred to as "employer") first violated the agreement by effecting a unilateral change in job classifications and in demoting plaintiff Mogge (hereinafter referred to as "employee").

A grievance hearing was held at which time the employer denied the grievance and refused to maintain the status quo pending arbitration. The employee was then discharged for insubordination.

Plaintiff-union twice requested arbitration under the agreement, but the employer denied the validity of the agreement and refused to submit to arbitration. The position of the employer in denying the existence of a contract is that the directing business agent who signed and executed the agreement had no authority to do so and the contract was not entered into in accordance with the policy and by-laws of the organization requiring all

contracts to be submitted to the governing board for approval. The employer also contended that even if there were a contract it appeared there was nothing to arbitrate as its rights were clear. Plaintiffs then filed this suit.

Defendant now moves to dismiss or stay these proceedings and refer the matter to arbitration. It now admits that the contract, if one existed, requires the matter be submitted to arbitration, and "by agreeing to arbitrate all disputes, the parties have in fact surrendered the right to sue for damages."

Plaintiffs argue that the defendant has repudiated and waived its right to arbitration by refusing to arbitrate initially.

Much as I readily understand plaintiffs' feelings in the matter, I cannot agree with their contention. ". . . in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important . . ." *Drake Bakeries* v. *Local 50*, 370 U.S. 254, 262 (1962).

I find that there was a valid and enforceable contract between the parties. Defendant's previous contesting of the validity thereof I further find was not unreasonable.

Unlike the defendant in *E. T. Simonds Const. Co.* v. *Local 1330 Hod Carriers*, 7th Cir. 315 F. 2d 291, defendant promptly moved for a stay of these proceedings and asserted its right to arbitration when this suit was filed. Therefore, I find no waiver of a right to arbitration.

Based on the rationale of *Drake Bakeries* v. *Local 50*, 370 U.S. 254 and *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247, defendant's motion to stay these proceedings pending arbitration is granted, and this cause is continued generally to be set upon ten days notice by either party upon the conclusion of the said arbitration.

/s/ Campbell
Chief Judge

Dated: April 21, 1967

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — SEPTEMBER SESSION, 1967

ROSEMARY C. MOGGE and OFFICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 28, AFL-CIO,

Plaintiffs-Appellants,

No. 16304 v.

DISTRICT No. 8, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois — Eastern Division.

DECEMBER 26, 1967

Before CASTLE, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This action is brought under Section 301(a) of the Labor-Management Relations Act of 1947[1] by Mrs. Mogge and her union, Local 28,[2] to recover damages for her discharge by another union, her employer.[3]

[1] Section 301(a) provides (29 U.S.C. § 185(a)):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[2] Office Employees' International Union, Local 28, AFL-CIO.

[3] District No. 8, International Association of Machinists, AFL-CIO.

In August 1950, Mrs. Mogge was employed by District No. 8 as a stenographer-secretary for two days a week. In early 1951 she commenced working three days a week; in the spring of 1952, she started working on a five-day basis. In February 1963, Mrs. Mogge took a six-month maternity leave of absence. Upon her August 1963 return, she worked on a three-day basis.

Since July 1945, James G. McDonald was Directing Business Representative of District No. 8. He resigned in February 1965. At the request of the Council of District No. 8, the Grand Lodge of the International Association of Machinists assumed supervision of the District and Eugene Glover became its Deputy Supervisor.

On April 5, 1965, Glover instructed Mrs. Mogge to report to work five days a week commencing with the week of April 12th. She insisted that she had the right to work only three days a week under the terms of a January 2, 1964, collective bargaining agreement between Local 28 and District No. 8. At this juncture, Mrs. Mogge reported the impasse to Sara Keenan, the business representative of Local 28. Miss Keenan requested a meeting with Mr. Glover. After an April 12 conference attended by Mrs. Mogge, Miss Keenan, Mr. Glover and George Gray of District No. 8, Glover advised Miss Keenan that Mrs. Mogge's grievance was denied, on the ground that there had been no violation of the collective bargaining contract.

Mrs. Mogge's refusal to work five days a week resulted in her discharge on April 13. On that day, Local 28 requested District No. 8 to arbitrate the discharge under Article XIII of the collective bargaining agreement. District No. 8 refused, asserting that no binding collective bargaining agreement was in existence. This suit followed.

About two months after the complaint was filed, District No. 8 filed a motion to dismiss the complaint on the ground that the collective bargaining agreement had not been submitted to its Council and therefore was not binding. In the alternative, District No. 8 requested that the proceedings be stayed pending arbitration. The plaintiffs filed a cross-motion for summary judgment, seeking to establish the validity of the collective bargaining agreement between the two unions.

The District Court granted District No. 8's motion to stay the proceedings pending arbitration and held that the collective bargaining agreement was valid. The court reasoned that because District No. 8's denial of the validity of the agreement was not unreasonable, it had not repudiated its promise to arbitrate. District No. 8 has not cross-appealed from the decision upholding the agreement.

As noted, District No. 8 refused arbitration on the ground that the collective bargaining agreement was invalid for want of approval by its Council.[4] Before arbitration could be ordered pursuant to the agreement, it was imperative for the District Court to determine its validity. *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 547. The District Court's determination that the contract is valid is unchallenged. However, plaintiffs refuse to honor Article XIII, the arbitration clause, contending that District No. 8 waived its arbitration rights by its earlier refusal to arbitrate.

As seen, the District Court concluded that District No. 8's contest of the validity of the collective bargaining agreement "was not unreasonable." We agree. District No. 8 demonstrated that the agreement was never approved by the District Council and that Mrs. Mogge knew of the District's procedures requiring Council approval of matters of importance. This was sufficient to raise a good faith doubt as to the validity of the agreement. *Hamilton Foundry & Machine Co.* v. *International Molders & Foundry Workers,* 193 F.2d 209, 214-215 (6th Cir. 1951), certiorari denied, 343 U.S. 966. District No. 8 had the right to a judicial determination of the threshold question of validity before being required to proceed with arbitration. Since District No. 8 had a plausible ground for challenging the validity of the collective bargaining agreement, its refusal to arbitrate until that question could be determined did not constitute a waiver of arbitration. See *Drake Bakeries* v. *Bakery Workers,* 370 U.S. 254, 262-263. As *contra,* plaintiffs rely on 6A Corbin on Contracts § 1443, but the author was referring to waiver of arbitration caused by wrongful repudiation of a contract. *Idem* at p. 434; see also note 7, *infra.* If

[4] District No. 8 also contested the execution date of the contract.

District No. 8's grounds were patently untenable or clearly wrong, as in the cases relied on by plaintiffs, its refusal to arbitrate would of course have waived the arbitration provisions of the contract.

District No. 8 did not seek to have the merits of the dispute resolved by the District Court. At the time of its first pleading, District No. 8 challenged the validity of the contract and, alternatively, sought arbitration. Under *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 266-267, the request for arbitration did not come too late. Nor can it be concluded that the request for arbitration fails because it was pleaded as an alternative to the motion to dismiss. In *Genesco, Inc.* v. *Shoe Workers*, 341 F.2d 482 (2d Cir. 1965), an employer sued a union for breach of a no-strike clause in a collective bargaining contract. The union filed a motion to dismiss on the ground that under the agreement the dispute should be arbitrated, but it also attempted to reserve its right to challenge the validity of the contract. The court held (at p. 484):

> "Since the contract pleaded by the employer had an arbitration clause, the union was entitled to raise the question whether an action was not barred by its very terms, while reserving the right to deny the existence of the contract if the court decided adversely, * * *."

The same result should apply where, as here, a defendant first seeks a ruling on validity and requests arbitration in the alternative.

Finally, plaintiffs assert that arbitration is improper because District No. 8 is in default within the meaning of § 3 of the United States Arbitration Act.[5] District

[5] Section 3 provides (9 U.S.C. § 3):

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. * * *."

No. 8's argument that the United States Arbitration Act is inapplicable is foreclosed in this Circuit by *Pietro Scalzitti* v. *International Union of Operating Engineers*, 351 F.2d 576, 579-580 (7th Cir. 1965). Section 3 of the Act was construed in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942).[6] There the court approved defendant's alternative pleading denying the existence of the contract but otherwise praying for arbitration. Since the District Court's finding that District No. 8's challenge of the contract's validity was "not unreasonable" has support in the record, we hold there was no default in proceeding with arbitration within the meaning of § 3 of the United States Arbitration Act.[7] If plaintiff's view were adopted that District No. 8 should have proceeded with arbitration forthwith, it might have lost the right to challenge the validity of the agreement. *Lewis* v. *Kerns*, 175 F.Supp. 115 (S.D. Ind. 1959). Yet the *Kulukundis* opinion itself recognizes that a defendant should not be foreclosed from denying the validity of a collective bargaining agreement before arbitration.

The judgment is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[6] *Kulukundis* was cited with approval in *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 262, note 9.

[7] In *Kulukundis*, Judge Frank does state that the default provision of § 3 of the United States Arbitration Act applies to "a party who, when requested, has refused to go to arbitration" (126 F.2d at p. 989), but an earlier passage from the opinion, citing 6 Williston on Contracts (Rev. Ed. 1938, § 1921), shows that the reference was to wrongful refusals to arbitrate (*idem* at p. 988).

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, December 26, 1967

Before

Hon. LATHAM CASTLE, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

ROSEMARY C. MOGGE and OFFICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 28, AFL-CIO,

Plaintiffs-Appellants,

No. 16304 v.

DISTRICT NO. 8, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois — Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, January 23, 1968

Before

Hon. LATHAM CASTLE, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

ROSEMARY C. MOGGE and OFFICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 28, AFL-CIO,

Plaintiffs-Appellants,

No. 16304 v.

DISTRICT NO. 8, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois — Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX E

Title 29 United States Code §185

Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office,

or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

Title 9 United States Code §1

"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. July 30, 1947, c. 392, § 1, 61 Stat. 669.

Title 9 United States Code §3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, § 1, 61 Stat. 669.